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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM H. ALSUP

WAYMO, LLC)
)
Plaintiff,)
)
vs.) No. C 17-00939 WHA
)
UBER TECHNOLOGIES, LLC., OTTO)
TRUCKING, LLC, and OTTOMOTTO, LLC,)
) San Francisco, California
Defendants.) Thursday
) October 26, 2017
) 9:00 a.m.

TRANSCRIPT OF PROCEEDINGS

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Official Reporter - US District Court

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1 **P R O C E E D I N G S**

2 **OCTOBER 26, 2017**

9:06 A.M.

3 **--000--**

4 **THE CLERK:** Calling Civil Action 17-939, Waymo, LLC
5 versus Uber Technologies, Inc. et al.

6 Counsel, please approach the podium and state your
7 appearances for the record.

8 **MR. PERLSON:** Good morning, your Honor. David
9 Perlson from Quinn Emanuel for plaintiff Waymo.

10 With me is Charlie Verhoeven, Jordan Jaffe, Mark Tung,
11 David Eiseman, Andrea Roberts and Melissa Baily.

12 **THE COURT:** All right. Thank you.

13 **MR. GONZÁLEZ:** Good morning, your Honor. Arturo
14 González from Morrison and Foerster.

15 Also with me is my partner, Michael Jacobs, Esther Kim
16 Chang and Michelle Yang.

17 **THE COURT:** Okay. Thank you.

18 **MR. CARMODY:** Good morning, your Honor. Bill Carmody
19 with Sussman Godfrey, and I have Joe Grinstein with me as well.

20 **THE COURT:** Thank you.

21 **MS. DEARBORN:** Good morning, your Honor. Meredith
22 Dearborn from Boies Schiller and Flexner.

23 **MR. CHATTERJEE:** Good morning, your Honor. Neel
24 Chatterjee from Goodwin Procter.

25 **MR. COOPER:** Good morning, your Honor. John Cooper,

1 Special Master.

2 **THE COURT:** Thank you, all.

3 All right. We'll here for -- this hearing is about the
4 proposed two additional trade secrets to be added to the case,
5 but -- we'll come to that, but before we get to that, I want to
6 focus on a different part of that motion, which is additions
7 that relate to the original nine trade secrets and don't relate
8 to the proposed two. In other words, kind of the old business
9 part of the case for a moment. I want to focus on that.

10 Now, as I understand it, the Defendants don't object to
11 supplementing the Hesselink report and you don't object to a
12 new expert Crain, C-R-A-I-N, re the due diligence process so
13 long as you get to do a rebuttal report -- not rebuttal, but
14 opposition report.

15 **MR. JACOBS:** Yes, your Honor. Matthew Jacobs.

16 That's correct.

17 **THE COURT:** That sounds reasonable to me. I'm going
18 to ask briefly is there any -- can we at least agree on that
19 had much?

20 **MR. VERHOEVEN:** We can.

21 **THE COURT:** Okay. All right.

22 Next. Defendant wants -- no. Defendant objects to new
23 witnesses, Levandowski -- Max Levandowski, Ratner, Bananzadeh
24 on the basis that they have nothing to do with the Stroz report
25 or with any new evidence.

1 Is that true? You still object?

2 **MR. JACOBS:** We do, your Honor.

3 **THE COURT:** So let me give you a chance to -- just
4 give me -- just articulate it in two minutes what your
5 objections are. Then we'll -- your name is?

6 **MS. ROBERTS:** Andrea Roberts.

7 **THE COURT:** Andrea Roberts. We're going to hear from
8 Ms. Roberts. Then we'll come back to you and give you more of
9 a rebuttal.

10 So take two minutes and explain why you object.

11 **MR. JACOBS:** The objection, your Honor, is based on
12 the following principle. Where the proposed addition can
13 fairly be traced to new information developed through the Stroz
14 disclosures that occurred after the Federal Circuit ruled, then
15 at least as a principled matter -- we may have granular
16 evidentiary objections, but as a principled matter, we don't
17 object to it going on their list of proposed witnesses,
18 proposed exhibits, et cetera.

19 Where, on the other hand, what we see as they are
20 attempting to backfill to their original case, or the case that
21 was in place before the Stroz disclosures, that strikes us as
22 unfair. That's basically a violation of your scheduling order.

23 They were supposed to list the witnesses and exhibits that
24 they had as of that date based on the information they had as
25 of that time, and they were supposed to put that in the

1 pretrial disclosures, and then we had a process for getting to
2 trial on those.

3 **THE COURT:** All right. Well, that's -- I understand
4 your point.

5 But are you equally guilty or at least somewhat guilty?
6 Do you have any witnesses or exhibits that are going to fall
7 into that category yourself? In other words, just plain old
8 late disclosures.

9 **MR. JACOBS:** Plain old late disclosures? We'll have
10 to negotiate out plain old late disclosures with the other side
11 or make a showing to your Honor of good cause.

12 **THE COURT:** Yes, but you're trying to stop them from
13 negotiating with you on these three witnesses, right?

14 **MR. JACOBS:** Yes. Well, just to be clear. I think
15 we're at sort of a threshold stage right now of do -- on
16 account of Stroz, does this massive --

17 **THE COURT:** What?

18 **MR. JACOBS:** On account of Stroz --

19 **THE COURT:** Oh, I see. Okay.

20 **MR. JACOBS:** -- does this massive addition to the
21 pretrial disclosures get allowed in or on account of Stroz does
22 it not get allowed in unless they can get it in on some other
23 basis that one is allowed to get in late stuff.

24 That's where we are. That's where we understand we are
25 procedurally at this point.

1 So if there is a late-discovered document, the usual stuff
2 that happens pretrial we anticipate will happen here and we
3 either will negotiate it out or come back to your Honor on a
4 very granular basis.

5 But let's take a look at this fellow Bananzadeh, for
6 example. That looks to us like an attempt to shore up their
7 damages case with a witness that was never on the Rule 26
8 disclosures. The damages case that pre-dates the disclosures
9 of Stroz, Stroz says nothing that's relevant to damages. There
10 is no good cause in Stroz to add that particular witness to
11 their Witness List.

12 So as a matter of the Stroz development, the Federal
13 Circuit ruling, et cetera, that falls on our other side of the
14 dividing line we think your Honor should apply.

15 **THE COURT:** All right. Just hold that thought for a
16 minute. Let's take Shawn Bananzadeh -- how do you say his
17 name?

18 **MS. ROBERTS:** That's a good question, your Honor. I
19 think it's Bananzadeh.

20 **THE COURT:** All right. So what is your answer on
21 him?

22 **MS. ROBERTS:** I think he would fall into the category
23 that Mr. Jacobs referred to of the additions at the end.

24 I can go into Max Levandowski and Daniel Ratner. Those
25 are tied to the Stroz report.

1 Mr. Bananzadeh is somebody that they deposed for a full
2 day in his 30(b)6 capacity and as an individual witness. He
3 was deposed as a 30(b)6 witness on the cost of developing each
4 of the alleged Waymo trade secrets, the original nine. And
5 that is the scope of the testimony that we would have him
6 testify about at trial. And I would add, we added him as a
7 "may call if the need arises" witness. So it may not even
8 arise.

9 With respect to Max Levandowski and Daniel Ratner, they do
10 derive from the Stroz disclosures. We had Motion to Compel
11 practice before Judge Corley relating to their depositions.
12 The documents that related to them are AEO, so I won't discuss
13 the substance --

14 **THE COURT:** Is Max Levandowski related to the other
15 Levandowski?

16 **MS. ROBERTS:** He is. He's his brother.

17 **THE COURT:** What is his testimony going to be in this
18 case?

19 **MS. ROBERTS:** So we deposed them a second time. We
20 found documents with Mister -- Max Levandowski and Daniel
21 Ratner's names on them that were part of the Stroz production.
22 We filed them -- we sought to take their depositions a second
23 time about those late-produced documents. Defendants objected
24 and didn't agree.

25 We took that to Magistrate Judge Corley. She agreed with

1 us and granted us two hours, two additional hours with each of
2 those deponents. And based on their testimony, we've added
3 them as "may call if the need arises" witnesses. So they were
4 definitely added because of --

5 **THE COURT:** When you took the deposition -- when you
6 took the deposition for two hours, did you confine yourself to
7 the subject matter of the newly-produced materials?

8 **MS. ROBERTS:** I believe we did, your Honor.

9 **MR. JAFFE:** More or less.

10 **MS. ROBERTS:** More or less.

11 **THE COURT:** All right. So let's -- Mr. Jacobs, just
12 on Levandowski, Max Levandowski, what I've heard does tie him
13 in to the late-produced documents. So what do you say to that?

14 **MR. JACOBS:** To the extent it does, your Honor, then
15 it falls on the Stroz side of the line and our objection would
16 be -- would not apply.

17 They actually deposed him on a whole bunch of stuff in
18 that two-hour deposition. It went beyond the Stroz
19 disclosures.

20 So I guess the question is what's the extent that he
21 gets -- that he now gets allowed -- that he now is allowed to
22 testify?

23 **THE COURT:** All right. How about Ratner? Is he the
24 same or is there a different story?

25 **MS. ROBERTS:** The same category in that we discovered

1 documents that related to him as part of the Stroz production.
2 We sought his deposition. We moved to compel. Magistrate
3 Judge Corley gave us two hours.

4 He was not previously deposed in the case and we
5 identified him as a "may call if the need arises" witness based
6 on what we learned from the Stroz production.

7 **THE COURT:** But you're the plaintiff. What do you
8 mean "may call"?

9 You're the -- you get to go first, so you -- you should
10 know what your case is going to look like, so are you going to
11 call these two people or not?

12 **MS. ROBERTS:** Well, your Honor, we have -- I think
13 this is pursuant to the Rule 16. But the witnesses are laid
14 out as "will call" and "may call if the need arises." And both
15 sides did that in the pretrial order.

16 So I think he's not in the group that we are very likely
17 to call, but we reserve the right to call him if the need
18 arises.

19 **THE COURT:** All right. So let me give you a
20 tentative ruling. You two can argue with me. I'll just take
21 Sean Bananzadeh.

22 **MS. ROBERTS:** Bananzadeh?

23 **THE COURT:** Yes.

24 Since he was a 30(b)6 that you produced, but they deposed,
25 right?

1 **MS. ROBERTS:** That's correct.

2 **THE COURT:** If they use the 30(b)6 deposition in any
3 way before the jury, through an expert or directly read in,
4 then he gets to come back and explain it in your rebuttal case,
5 but not in your case-in-chief.

6 In other words, you can't use him in your case-in-chief
7 because he's a new witness. But if they use him as a 30(b)6,
8 read-in or through the expert, that he's relied upon, then he
9 gets to come back limited to explaining what the -- the use
10 that was made of his testimony by the Defense. But that would
11 only occur in your rebuttal case.

12 Now, what do you say to that?

13 **MS. ROBERTS:** Well, your Honor, I think since --
14 since they deposed him, their approach to preparing to cross
15 examine him at trial would be no different than their approach
16 to cross examining everybody else because they have his
17 deposition.

18 **THE COURT:** Yeah, but under that theory that
19 everybody who got deposed in the case then is open season.
20 Anybody can -- can just automatically add them to their trial
21 list, right? Everybody who was deposed.

22 **MS. ROBERTS:** Fair enough, your Honor. There is just
23 one witness, and I think this falls into the category that
24 Mr. Jacobs raised, where sometimes parties negotiate for some
25 additions after they file their pretrial order.

1 **THE COURT:** But I'm not here to negotiate. I'm here
2 to try to make a ruling because you can't negotiate.

3 All right. Let me hear from your -- the other side. What
4 do you say to what I've proposed?

5 **MR. JACOBS:** That sounds fair, your Honor.

6 **THE COURT:** All right. That's what's going to be the
7 ruling on that guy. Okay?

8 **MS. ROBERTS:** Thank you, your Honor.

9 **THE COURT:** All right. Now, going to Max Levandowski
10 and Ratner. You can add them to your list for trial, but it's
11 limited to testimony that came out of the Stroz report or
12 something that was newly produced in that time period after the
13 Stroz report. And you cannot get off into other subjects in
14 your case-in-chief.

15 Do you object to that?

16 **MS. ROBERTS:** I think that's fine, your Honor.

17 **MR. JACOBS:** Same, your Honor.

18 **THE COURT:** Okay, good. So we've now solved those
19 three guys.

20 Now we go to: Defendant's object to new witness Neel
21 Chatterjee on the basis that it has nothing to do with the
22 Stroz report or new evidence.

23 All right. So what do you say to that?

24 **MS. ROBERTS:** Well, your Honor, it does deal with new
25 evidence because it's evidence that's come to light in the last

1 few weeks.

2 Mr. Chatterjee is on the list because we recently learned
3 that Goodwin Procter, as Mr. Levandowski's personal counsel,
4 ran searches on his personal laptop and handed those searches
5 over to Uber, who handed them over to Uber's forensics expert
6 Kevin Faulkner. And Mr. Faulkner relies on those searches and
7 so he's relying on the facts that were created by Goodwin
8 Procter.

9 We've sought discovery on this before Magistrate Judge
10 Corley because, you know, we don't know the details of who
11 specifically at Goodwin Procter ran the searches, but we know
12 that there were communications between Mr. González and Mr.
13 Chatterjee about having those searches run. So Mr. Chatterjee
14 is added as a fact witness relating to those searches of
15 Mr. Levandowski's personal laptops who, until very recently,
16 Waymo did not know had been searched in this case.

17 **MR. JACOBS:** Your Honor, I think the best objection
18 on this is the one that Otto Trucking itself filed on behalf
19 of -- in opposition to Mr. Chatterjee being added to the
20 Witness List, and Mr. Chatterjee is here.

21 We really don't -- we don't know a lot about what
22 happened. You'll recall that Goodwin Procter also represented
23 Mr. Levandowski in the arbitration and in connection with that
24 representation had the laptops.

25 I think the briefing on this from Otto Trucking, from

1 Goodwin Procter, is probably the clearest explication of why
2 this should not happen. It includes the argument that trial
3 counsel should not ordinarily be a witness and that the burden
4 of showing that it should be a witness is quite high.

5 In addition --

6 **THE COURT:** But this is related to this other filing
7 that you have that I have read and I -- both sides, and I'm
8 not -- we're not going to get into it today, I don't think, but
9 the -- about the -- you wanted to add. This is yet another
10 indictment against the lawyers for hiding the ball, to put it
11 in terms I can understand. So I'm not sure I'm ready to rule
12 on that issue yet. So maybe we'll postpone this one.

13 Okay. Is there anything else -- we're going to postpone
14 this one.

15 Is there anything else that relates just to the asserted
16 nine trade secrets that is in this motion to amend?

17 **MR. JACOBS:** Yes, your Honor. There is the proposed
18 exhibits.

19 **THE COURT:** 4,000 new exhibits.

20 **MR. JACOBS:** We filed an errata on that, your Honor.
21 It's 1200.

22 **THE COURT:** All right. How can you make a mistake
23 that big?

24 **MR. JACOBS:** I think the -- we were starting with the
25 beginning of the Bates range and the end and missed that there

1 were gaps in the middle as we put it together.

2 **THE COURT:** All right. Well, 1200 is still a large
3 number.

4 So what's your objection?

5 **MR. JACOBS:** Well, the objection is the sheer --
6 number one, the sheer volume of it.

7 I think the other objection is actually tying it to
8 anything significant. We haven't gone through them yet on a
9 granular basis. I think probably the best approach to deal
10 with these is to take them in the ordinary -- more in the
11 ordinary course and we'll prepare whatever specific objections
12 we have to them, including the question of lateness.

13 **THE COURT:** So why don't we -- but they are not --
14 they are late because you produced the documents late. That's
15 not a good objection. Right?

16 All of these 1200 comes from the Stroz and material
17 produced either at Stroz or later, right?

18 **MR. JACOBS:** Yes.

19 **MS. ROBERTS:** That's correct, your Honor.

20 **THE COURT:** Okay. Well, then to my mind lateness is
21 not a legitimate objection since Uber and Uber's counsel are
22 the ones that created this Frankenstein monster to begin with
23 about the due diligence report and they just got it. They just
24 got it. And they got it as fast as the Federal Circuit
25 would -- so it's not their fault on that one.

1 So lateness is not a problem, but there is a recurring
2 problem. Maybe you're not the one for me to lecture, but
3 plaintiffs -- you're the plaintiff. A plaintiff is supposed to
4 make it easy to get the case to trial, not hard to get the case
5 to trial.

6 You're supposed to solve problems and not create problems.
7 So when you throw 1200 indiscriminate documents out there,
8 you're just making it easy for the other side to whine. Your
9 side is not supposed to whine. You're side is supposed to
10 solve problems and make it easy to get a jury over there and to
11 present your case. Sometimes that means giving up on a lot of
12 things in order to get the case there instead of constantly
13 holding on to every conceivable deal.

14 So I want you lawyers on that side of the room to take
15 that -- my view to heart; that sometimes you're letting the
16 poor judge down by complicating the case beyond. All right.

17 **MR. JACOBS:** Your Honor, if I could just clarify what
18 I meant.

19 First of all, we believe that some of these documents were
20 produced before the fact discovery cut-off. So that is -- that
21 then falls on the other side of the line.

22 **THE COURT:** See, I misunderstood that.

23 **MR. JACOBS:** And I apologize.

24 **THE COURT:** Then that is a problem.

25 **MR. JACOBS:** The other aspect of lateness --

1 **THE COURT:** Do you believe that or do you know that?
2 Come on. You go from 4,000 to -- is it a belief? I need to
3 make sure you're right about that.

4 **MR. JACOBS:** That is our calculation, your Honor.

5 **THE COURT:** What do you mean?

6 **MR. JACOBS:** That we -- we looked at the documents
7 and we put in our brief some of which were produced before
8 discovery closed.

9 **THE COURT:** Yes, but were all of these produced as
10 part of the Stroz or later? Because if it -- let's say it's
11 the identical document that got produced on day one, but
12 nevertheless it's also in the Stroz report. That's -- that's
13 an independent event that has evidentiary value, if it was in
14 the Stroz report.

15 So the fact that it's a duplicate doesn't mean that it
16 doesn't -- that it's a late document because it's now being --

17 **MR. JACOBS:** I take that as an amendment to our
18 dividing line, your Honor, and I accept that as a -- as a
19 rationale for proposing to add it to the Exhibit List.

20 What I meant by lateness in this context is the practical
21 point that I believe your Honor was just addressing. We are
22 only a few weeks away from trial. Depositions are done. And
23 in order to get a document in front of the jury in this case
24 there should be a good reason, even if it was part of the
25 late-disclosed material from Stroz.

1 **THE COURT:** All right.

2 **MR. JACOBS:** And 1200 exhibits there cannot be a good
3 reason for.

4 **THE COURT:** All right. I'm sympathetic to that and
5 that's the purpose of my lecture, but the lecture is -- I have
6 to override that objection based on the ground that you,
7 yourself, caused this problem with the late production. You
8 can't blame them for that late production, even though it makes
9 it harder and harder.

10 So I'm overruling that objection. The 1200 can stand, but
11 it's subject to individual objections, of course, that the --
12 that it shouldn't come into evidence for some other reason.

13 All right. Now, let's turn -- are there more in the
14 category of things that relate just to the nine trade secrets?

15 **MR. JACOBS:** No, your Honor.

16 **THE COURT:** How about on your side?

17 **MS. ROBERTS:** I don't have any objections to what we
18 added.

19 **THE COURT:** All right.

20 Okay. We will now turn to the proposal to add two new
21 trade secrets to the list.

22 **MR. VERHOEVEN:** Shall I proceed?

23 **THE COURT:** Yes.

24 **MR. VERHOEVEN:** So the -- we are moving, your Honor,
25 to add two specific identified trade secrets. We can't go into

1 the substance because it's AEO.

2 **THE COURT:** Can't you refer to them in one word or
3 two? I believe you can without revealing any --

4 **MR. VERHOEVEN:** Yes. I'll refer to them by number,
5 if that's okay.

6 **THE COURT:** All right. Go ahead.

7 **MR. VERHOEVEN:** 123 and 124 identified in our briefs.

8 We believe we have good cause to add these, your Honor,
9 because we discovered new information about the individual,
10 Mr. Burnette, who was part of the team that Uber recruited that
11 came over with Mr. Levandowski and this new information was
12 notes that Mr. Burnette had on his personal laptop.

13 We had no knowledge of this before the Stroz production.
14 We had no knowledge of this until we looked at the image.

15 **THE COURT:** Well, wait a minute. You did have
16 knowledge of Burnette and you --

17 **MR. VERHOEVEN:** Yes, we did.

18 **THE COURT:** And you even examined him in deposition
19 way before you got the Stroz report on this very subject.

20 **MR. VERHOEVEN:** We did cover this subject at his
21 deposition and his testimony, your Honor, was that the
22 Ottomotto planner was, quote, fundamentally different, close
23 quote, from Waymo's.

24 He further testified that he developed his approach --
25 this is pre-Stroz. Developed his approach by going, quote, to

1 the drawing board, close quote. And reviewed what was, quote,
2 seen in the industry. And, quote, what people were working on,
3 close quote. And, quote, what was the academic research.

4 So he testified before we had this discovery that this
5 software was not like Waymo's; that he did it from scratch; and
6 that he did it using publicly available information to help
7 him.

8 Then we took -- then we got the Stroz report and the Stroz
9 report showed -- or the documents associated with the Stroz
10 report indicated that his -- on his personal laptop,
11 Mr. Burnette's personal laptop, he had created detailed notes
12 and the notes were created either the day after he left Waymo,
13 February 10th -- he left Waymo on February 9 -- or the day of
14 leaving Waymo.

15 He admits that the notes reflect the Waymo approach that
16 he was developing while he was at Waymo and he admits that he
17 used these notes to develop Otto's -- Ottomotto's approach.

18 And I'll just quote for your Honor. This is Page 261,
19 Lines 7 through 12 of his deposition.

20 "Question" -- well, this is designated, but I don't think
21 it's confidential. I'll summarize it. That what he was
22 working on or what he's describing in his handwritten notes are
23 the same thing as what he was doing at Waymo.

24 And he further testified that he gave those notes to
25 another person who came over from Waymo as part of this

1 recruiting effort of Uber's so that that person could begin
2 developing the -- a different version, a different type of
3 planning software that Uber was going to use or that they were
4 going to tell Uber that they should use, your Honor.

5 This is all stuff that we learned subsequent to seeing
6 these notes. And, you know, they say in their --

7 **THE COURT:** Again, the notes that you saw for the
8 first time with Stroz were the handwritten notes or were
9 they -- were they the ones on the computer?

10 **MR. VERHOEVEN:** They are handwritten notes, your
11 Honor.

12 **THE COURT:** And you said something though about notes
13 that were on the computer. Were those -- are those the same
14 thing?

15 **MR. VERHOEVEN:** Mr. Jaffe has the specifics.

16 **MR. JAFFE:** They were handwritten notes that were
17 scanned and on his computer.

18 **THE COURT:** All right. And he put those on either
19 the day he left or the day after he left.

20 **MR. JAFFE:** They are dated February 10th.

21 And then when we asked him at his deposition, "When did
22 you do those?" he -- the best he could say is that it was that
23 day.

24 **THE COURT:** And these notes are how long?

25 **MR. JAFFE:** Three pages.

1 **THE COURT:** What do they describe in general?

2 **MR. JAFFE:** They describe what he came up with for
3 the -- the Ottomotto planner, which was -- takes the approach
4 that he came up with at Waymo.

5 **THE COURT:** So did he testify that what he came up
6 with at Ottomotto was the same that he had done at Waymo?

7 **MR. JAFFE:** I mean, that was what Mr. Verhoeven was
8 about to quote from his deposition, where --

9 I don't know if you have the -- do you have that quote?

10 **MR. VERHOEVEN:** Your Honor, let's see. I have a
11 deposition cite. This -- can I confer to see if they want to
12 keep their confidentiality on this?

13 **THE COURT:** Sure.

14 (Discussion held off the record between counsel.)

15 **MR. VERHOEVEN:** All right. I've got permission to
16 quote it.

17 **"QUESTION:** Isn't it fair to say that what you
18 described in the handwritten notes, that it uses the
19 approach that you came up with at Waymo?

20 **"ANSWER:** Yes."

21 So this is just one quote. I mean, the deposition, and
22 we've cited it in our briefs, also shows that he didn't consult
23 anything when he wrote the notes. He just wrote them all down
24 the day after he left. Didn't look at any documents. Didn't
25 do any research. Didn't look at any public things that are

1 available like he testified in his first deposition. He just
2 wrote them up.

3 **THE COURT:** Well, did he say that while he was at
4 Waymo, they -- that Waymo actually did carry out that approach?

5 **MR. VERHOEVEN:** He personally developed the approach
6 while he was at Waymo.

7 **THE COURT:** But did Waymo adopt it in its system?

8 **MR. VERHOEVEN:** Well, he doesn't know that because
9 he's left, but the answer is yes.

10 Let's see. I'll give you the facts. We get chastised in
11 the brief because we didn't address that. I apologize if we
12 should have addressed that, but the answer is, yes, we
13 currently use those trade secrets.

14 I don't know that it's completely relevant to a motion to
15 amend.

16 **THE COURT:** All right. Hold that thought for a
17 second. We're going to come back.

18 But address what I've just heard, Mr. Jacobs. What do you
19 say to that?

20 **MR. JACOBS:** What we say to that, your Honor, is it's
21 got the heart and the course -- the cart and horse reversed.
22 You're supposed to know in advance what your trade secrets are.

23 They have never explained why their list of 121 trade
24 secrets, which included a software trade secret, which -- and
25 when they pursued software discovery in this case, why if this

1 is so valuable -- and now we know that it is used.

2 I thought their argument was going to be, well, we didn't
3 catalog it because it was on the shelf and we never implemented
4 it. But now we know that it was -- now they are telling us it
5 was implemented. So why isn't it on their list of 121?

6 What has happened instead is classic *ex post facto*
7 definition of a trade secret. They get a document. They see
8 the document in Stroz.

9 Their case is falling apart on the technical merits on the
10 existing nine. They are doing everything they can to keep
11 their technical case alive.

12 **THE COURT:** That's a different point. Just stick to
13 the merits of this one.

14 Is it true that the witness said that he -- that this is
15 the approach he used at Waymo and this was the approach he used
16 at Ottomotto? One in the same?

17 **MR. JACOBS:** He did not -- I think we have to be very
18 careful on the technical aspects of what was being asked.

19 But he did not deny that there are aspects of what he
20 wrote in those notes that are similar to what he came up with
21 as part of an experimental plan that so far as he knew was
22 never implemented at Waymo because it had aspects of it that at
23 Waymo they deemed were impractical.

24 And so as far as he knew, these were -- these were ideas
25 that he put on the shelf in terms of software. He tried to

1 persuade people, but they said: No, you can't do it.

2 And at that level -- at a level of what variables go into
3 this, at the level of physical concepts, in his mind he was --
4 he had it his mind that these were not trade secrets and he
5 wrote it down in his notes when he got to Uber and to take
6 another shot at it.

7 But that does not explain under the applicable case law
8 why they get to add it at this late stage.

9 **MR. VERHOEVEN:** May I address that, your Honor?

10 **THE COURT:** What do you say to the fact that the --
11 you know, the whole point of the disclosure is -- and I've seen
12 it in so many cases. The plaintiff gets into the other side's
13 files and suddenly they discover: Oh, that's our trade secret.
14 But they didn't disclose it up front. And you did not disclose
15 it up front.

16 **MR. VERHOEVEN:** That's right, your Honor. That's
17 because our case, when we filed it, was based on LiDAR, your
18 Honor. And don't take my word for it. In their own brief they
19 say, quote:

20 "Waymo's two new software secrets do not pertain
21 to the specific LiDAR hardware technology that has
22 been the focal point of this case from the outset."

23 **THE COURT:** Why don't you have a new lawsuit then?
24 You could have a new lawsuit, non-LiDAR.

25 **MR. VERHOEVEN:** Well, there's issues that we need to

1 be concerned about, your Honor, in terms of claim splitting and
2 preclusion, and we discovered it in this case.

3 And if we just file it in a different case, they will move
4 to dismiss because it comes from the same nucleus of operative
5 fact and all of that.

6 So what we did, your Honor --

7 **THE COURT:** Let's find out. Would you agree they
8 could file a separate lawsuit?

9 **MR. JACOBS:** No, your Honor.

10 **MR. VERHOEVEN:** See. There you go.

11 **MR. JACOBS:** We will have a dispute about that
12 undoubtedly.

13 **THE COURT:** What if I say they can?

14 **MR. JACOBS:** I'm sorry?

15 **THE COURT:** What if I say they can?

16 **MR. JACOBS:** You're the czar, your Honor.

17 **THE COURT:** Good.

18 **MR. VERHOEVEN:** Your Honor, if I could just finish on
19 the points addressing the -- here. Where was I?

20 So, first, this isn't a shifting sands of our trade secret
21 list. This is a different desert. And we -- we came upon it
22 solely through getting the Stroz materials. And the Stroz
23 materials --

24 **THE COURT:** No, no, no. Because you deposed that guy
25 earlier, Burnette, before you got the Stroz material and you

1 asked him questions about this.

2 **MR. VERHOEVEN:** That's true.

3 **THE COURT:** So it's not quite right to say that you
4 only figured it out --

5 **MR. VERHOEVEN:** That's true. But in fairness to us,
6 he was a diligenced employee by Stroz. He was a former Waymo
7 employee. So we were just trying to figure out generally if he
8 took anything, your Honor.

9 And when we came to that, he said under oath that these
10 were completely different; that he developed this software from
11 scratch; that he developed it based on public materials that
12 were out there.

13 And when we got the Stroz materials, we have his own
14 handwritten notes dated the very next day after he left Waymo,
15 that he created without consulting anything, that he admits
16 are -- is the same thing he was doing at Waymo, your Honor.

17 And in terms of making things up, taking discovery to make
18 things up of new trade secrets, we're not making anything up.
19 His own self-performance reviews that he submitted while he was
20 at Waymo, your Honor, talk exactly about these two trade
21 secrets at Waymo.

22 How could we be making these up if -- if he, himself,
23 while he was at Waymo, bragged about his development of these
24 two things, your Honor?

25 We're not making anything up. What's happened is we've --

1 we validly discovered something through the Stroz report, which
2 was that a significant amount of our software had been taken.

3 When we filed the Complaint, we have didn't have a Rule 11
4 basis to say that. We discovered it from Stroz.

5 And we followed that as fast as we could, in less than a
6 month, and through that hard work we did we found a couple of
7 software trade secrets that are highly significant to planning
8 software that indisputably were taken and, by the way,
9 that there is no dispute Uber is currently using.

10 So, you know, this is a significant development. It's not
11 us playing games about --

12 **THE COURT:** No, no. But we don't know the -- you
13 haven't gotten the code. You don't --

14 **MR. VERHOEVEN:** Well, there's nothing in -- I think
15 that if they weren't doing it, they would say so in their
16 opposition brief, your Honor.

17 Sure, we haven't got the code, but Burnette says they are
18 using it and we cited your Honor to several documents that
19 indicate they loved it and were planning to put it in.

20 We'd like to get the code so that there will be no
21 question about it. And if they are not using it, they
22 should -- they should want to give us the code.

23 **THE COURT:** All right. It seems to me that this is
24 not LiDAR. This is something different from LiDAR.

25 Does this use a -- well, I don't want to -- gyroscopes,

1 for example?

2 **MR. VERHOEVEN:** This is -- this is -- the planning
3 software is like the key. I mean, if you were to do a
4 hierarchy of --

5 **THE COURT:** Everyone who is building these cars knows
6 that you've got to do this.

7 **MR. VERHOEVEN:** You have to have planning software
8 generally, yes. And generally what the planning software does
9 is it takes information from all the sensors.

10 **THE COURT:** Yes. But you need these two things that
11 use -- I won't use the -- they start with J.

12 These two J items, wouldn't every single company know
13 you've got to do this? And then the only difference is going
14 to be how they implement it?

15 **MR. VERHOEVEN:** I'm sorry. I missed that because my
16 colleague handed me a note.

17 **THE COURT:** It seems to me that every company that is
18 building a self-driving car knows that it has to address these
19 two J's. I'm just --

20 **MR. VERHOEVEN:** No.

21 **THE COURT:** Yes, they do. Come on.

22 **MR. VERHOEVEN:** One of the Js is a coined term, your
23 Honor. It's not even outside of Waymo.

24 **THE COURT:** All right. The concept then. Maybe they
25 have got their own term for it.

1 **MR. VERHOEVEN:** I disagree, your Honor.

2 **THE COURT:** Okay. That's you talking.

3 **MR. VERHOEVEN:** Listen --

4 **THE COURT:** I know something about engineering. I
5 believe you're wrong, but I'm not -- that's just me and maybe
6 you could convince the jury.

7 But nevertheless, it seems to me they would both be known
8 questions to be addressed and every company has got to come up
9 with some implementation to address them, otherwise the car is
10 going to run off the road right off the bat.

11 **MR. VERHOEVEN:** Well, under that theory, your Honor,
12 there is no such thing as trade secrets for --

13 **THE COURT:** That's not true. That's not true.

14 **MR. PERLSON:** Well, these are specific
15 implementations --

16 **THE COURT:** Maybe your specific implementation would
17 be a trade secret.

18 **MR. VERHOEVEN:** That's why -- what we've tried to
19 define in 123 and 124, your Honor.

20 **THE COURT:** Maybe. But what if it turns out -- all
21 right.

22 **MR. VERHOEVEN:** Their argument -- just so I could
23 just respond.

24 Their argument basically is: Oh, these are just the
25 principles of physics.

1 Well, we're prepared to stipulate that every single one of
2 our trade secrets operate by the principles of physics. That
3 doesn't mean it's not a trade secret, your Honor.

4 **THE COURT:** If it's specific enough, then, yeah, it
5 qualifies as a trade secret.

6 Okay.

7 **MR. JACOBS:** Your Honor, may I --

8 **THE COURT:** You can address what you want to address.

9 **MR. JACOBS:** I think the basic question is: Have
10 they shown good cause under of the applicable legal standard?

11 They have never explained why, when they cataloged their
12 trade secrets, this was not in the catalog.

13 **THE COURT:** Well, they did. They say it wasn't a
14 LiDAR thing.

15 **MR. JACOBS:** Well, no --

16 **THE COURT:** And they were focusing on LiDAR and now
17 they find out that the problem goes beyond LiDAR.

18 **MR. JACOBS:** May 26th, your Honor. Waymo asks for
19 all software modules that were part of the Ottomotto
20 acquisition.

21 June 5 --

22 **THE COURT:** You didn't give it to them, right?

23 **MR. JACOBS:** But that's not to say they never thought
24 it was part of the case. It's not that they -- it's not that
25 they didn't think -- the question is their state of mind.

1 They're cataloging their trade secrets. They are going
2 through and saying: We lost these people to Uber. What might
3 they -- what do we have of value? And, your Honor, they listed
4 121.

5 **THE COURT:** Yeah. But what if they had cataloged
6 everything, like what are the color of the wheels and
7 everything else? Then there would have been 12,000.

8 **MR. JACOBS:** In June 18th they argue in a discovery
9 dispute that they believe that Otto software will, quote,
10 reflect implementation of some of Waymo's trade secrets.

11 On June 21 they add Don Burnette to their supplemental
12 initial disclosures relating to matters that concern
13 misappropriation of trade secrets.

14 On June 21 they moved to compel the software modules.

15 On July 21 they say that the Otto software modules are
16 very relevant to determining what Uber acquired.

17 They had access to the Otto source code on August 17th
18 and, yet, now we're two months later and they are proposing to
19 add these to their trade secrets list. This is not -- there is
20 no justifiable claim of: We're shocked, your Honor. We're
21 shocked that there is something in the software.

22 **MR. VERHOEVEN:** Your Honor, may I respond to this
23 chronology?

24 **THE COURT:** Yes, yes.

25 **MR. VERHOEVEN:** First of all, our motion -- the

1 source code we sought was because it was in the acquisition
2 documents. And our main argument for why we wanted it was
3 to -- for damages, to assess valuation.

4 We did argue that it would be relevant to a listed trade
5 secret, not the software trade secrets, trade secret 85. They
6 said: No, it's not. And software is out of this case. And
7 Magistrate Judge Corley says we get it because of damages.

8 They objected to your Honor and your Honor said we get it
9 because of damages. You didn't address whether it was relevant
10 to trade secrets or not. So this is a reconstruction,
11 revisionist reconstruction of that.

12 Second, second point. We got -- we finally got, after
13 having to fight for it, some software from them, but it was --
14 I don't have the exact dates. I can get them for you. It was
15 about a week before the end of fact discovery. It was a little
16 bit -- a little bit over a week before we had to file all of
17 our supplemental -- excuse me, file all of our expert reports.
18 It was after your Honor had required us to narrow our claims to
19 nine claims.

20 It was something that in -- that we -- basically it would
21 be -- for us to prepare for trial and then start looking for
22 software trade secrets, which we hadn't alleged in our list,
23 would have been ridiculous.

24 We got it. We got it late. We didn't have time to look
25 at it. We weren't bringing a software trade secret case. It

1 was relevant to damages, or one of the listed trade secrets.

2 And then we get this Stroz report and everything changes.

3 The Stroz report indicates significant misappropriation of
4 Waymo software files. And so we started pursuing that once we
5 discovered that they had taken those files.

6 We did not know that before. And then when we started
7 looking at it, we realized, your Honor, that -- through these
8 notes, that these specific secrets, the evidence showed without
9 question, had been taken.

10 And this is all in the rush, your Honor, of reviewing
11 1.4 million documents. We didn't even have a software expert.
12 Neither did they. So we hired a software expert on an
13 expedited basis and we meet the Court's deadline.

14 You know, all of this other stuff is happening --

15 **THE COURT:** Is this in the whine category?

16 **MR. VERHOEVEN:** No -- yeah. Maybe I crossed over to
17 the whine category, your Honor.

18 **THE COURT:** I think you're into the whine category.

19 **MR. VERHOEVEN:** I'm just trying to say we were
20 diligent. And if you look -- diligence really should be
21 measured at the Stroz point, where you saw the Stroz documents.
22 And if you look from that point on, there is no question we
23 were diligent.

24 **THE COURT:** Okay. Do you want to say something?

25 **MR. JACOBS:** Sorry, your Honor. Just, I know the

1 facts, your Honor. The stubborn facts.

2 July 21, Docket 971, Waymo's brief in support of Judge
3 Corley's order to produce the Ottomotto source code states
4 that:

5 "Otto software modules are very relevant to
6 determining what Uber acquired; namely, whether it
7 acquired Waymo trade secrets."

8 They are asking for the software. They are saying that
9 there are trade secrets in the software. They have one
10 identified trade secret on their list.

11 We say, your Honor, that can't possibly open up all of our
12 software discovery. What is going to happen if you give them
13 our software? They are going to draw a bull's eye around an
14 arrow and they are going to claim it as a trade secret.

15 And that's exactly what has happened in violation of case
16 after case, which says that's exactly what's not supposed to
17 happen; that you're not supposed to be allowed to rummage
18 around and then declare what is a trade secret afterwards. A
19 trade secret, your Honor, that they now say is worth six to
20 ten percent of the value of self-driving.

21 **MR. VERHOEVEN:** Your Honor, I have to respond to
22 this.

23 **MR. JACOBS:** They left this one on the shelf --

24 **MR. VERHOEVEN:** I have to respond to this. The
25 notion that we're "rummaging around" --

1 **THE COURT:** Let Mr. Jacobs finish. Have you
2 finished?

3 **MR. JACOBS:** I think you've got it, your Honor.

4 **MR. VERHOEVEN:** The notion that we're "rummaging
5 around." These arguments are like truth is falseness. They
6 are -- they are completely opposite of what happened in this
7 case.

8 What happened is we had been seeking the Stroz materials
9 since the very beginning of this case and been blocked --
10 whether it's right or wrong, been blocked by privilege
11 objections until well after the end of discovery and that we've
12 diligently looked at the Stroz materials in a Herculean effort,
13 in a short amount of time, and discovered these things.

14 We're not "rummaging around." We found evidence that we
15 didn't know before that is documented and testified to that
16 they took two of these trade secrets. The evidence of those
17 secrets are not made up. They are in the employee's own
18 performance reviews while he was at Waymo.

19 This is not "rummaging around," your Honor. This is us
20 finally getting access to a highly material investigation that
21 was done. And, you know, just call it "rummaging around." I'm
22 sorry. I know I have a hot head, but that just is not what was
23 going on.

24 **MR. JACOBS:** Last point for me, your Honor.

25 The reason this is whining is that the plaintiff here has

1 asked that this all be done on a rush-rush basis. The -- as
2 recently as June you asked them whether they wanted to keep to
3 their early trial date and you made it clear that has
4 consequences, and now those consequences are coming home to
5 roost.

6 They should not be allowed -- when coming into this case
7 the way they came in, with the case having fallen apart the way
8 it has fallen apart -- to use your Honor's word
9 "deteriorated" -- to now be able to resuscitate it on the basis
10 of trade secrets they never properly identified in accordance
11 with the applicable principles is fundamentally unfair.

12 **MR. VERHOEVEN:** I could respond, but I'm going to
13 restrain myself, your Honor.

14 **THE COURT:** Thank you. Thank you.

15 All right. Maybe I should get the Hastings -- are any
16 Hastings law students still here? Maybe I should get them to
17 give me a show of hands on what they would do.

18 (Laughter.)

19 **THE COURT:** All right. Here is what the judge is
20 going to do. The judge is -- I'm not denying this motion, but
21 I am not granting this motion and we're going to postpone this
22 motion until after the trial.

23 I probably would have granted -- I would have gone with
24 Mr. Jacobs, except that he absolutely refused on the splitting
25 of the cause of action thing. And I think that might be

1 unfair, too. So we will hold for a future day whether we have
2 trial two.

3 We're going to have trial one November 29 and it will not
4 include these two new trade secrets. But maybe trial number
5 two, in the distant future or the future of 2018, will include
6 these two possible trade secrets, but I'm not ruling that they
7 are in yet. We're just going to wait and see.

8 I do see some -- there are two very good points that are
9 made. Mr. Jacobs is totally right. It is not fair -- not
10 totally right. He's right to a point; that it's unfair for a
11 trade secrets plaintiff to get into the other side's files and
12 then say: Ah-hah. That's our trade secret. That's why you
13 have the disclosure up front.

14 On the other hand, we have a situation where the -- the
15 Waymo side thought that the problem was LiDAR and then along
16 the way they begin to pick up signals that maybe it goes beyond
17 LiDAR. Then when your due diligence report finally came out,
18 they could see more direct evidence of these handwritten notes
19 that show that he may have carried over whatever he was using
20 at Waymo to Ottomotto and, hence, to Uber.

21 Maybe it's not even a trade secret to begin with, but that
22 would be for another day.

23 I'm not ruling on this. I'm not saying that we will have
24 a second trial. It's just that after we get the first trial
25 done and the verdict is in -- and there won't, of course, be

1 any final judgments so no one will be able to appeal -- we will
2 have round two, maybe.

3 Now, I want to give more explanation here. This is not
4 LiDAR, which has been the focus of the case. This is a new
5 subject. This is not Levandowski and the 14,000. This is the
6 other fellow.

7 **MR. VERHOEVEN:** Burnette.

8 **THE COURT:** Burnette.

9 **MR. VERHOEVEN:** Mr. Ron Burnette.

10 **THE COURT:** Yeah, somebody else. It's not in the
11 list of 121. It's not in the list of nine. It might even
12 require amendment of the Complaint. It's not a hardware
13 problem, like the LiDAR things that we have been dealing with.

14 It's a -- it's a software problem. When we get into code,
15 it's going to be harder and harder for the jury to put their
16 arms around this whole case.

17 We have a trial date set, it's November 29. We're going
18 to do that trial because Uber has the right to clear its name,
19 if it can.

20 Now, Mr. Jacobs has overstated what I've said. I do
21 believe -- I do believe that the plaintiffs thought they were
22 going to get into your files and find that there was absolute
23 duplicates. They have not found any smoking guns on any of the
24 trade secrets, but they -- they may be able to prove the case
25 anyway through -- you don't have to have a smoking gun to win

1 the case. Maybe they will prove it. So it's not as clean a
2 case as the plaintiffs would like, but it is a triable case.

3 So I think Waymo ought to get in there and put up or shut
4 up. We're going to get to the bottom of these trade secrets
5 that are on the list. Uber has the right to clear its name and
6 if it thinks it can win these trade secrets, then God bless
7 them. They are going to win the trade secrets by the end of
8 the year. There will be a -- well, by the end of -- by the end
9 of -- if we have to go into January, which I hope we won't, we
10 will get a verdict on these.

11 Then we'll come back and deal with whether or not to
12 enlarge the list of trade secrets for another day. They are
13 severable problems. So that's what we're doing.

14 I want to be clear. I'm not granting that these two are
15 in, but I'm not saying they are out. And we -- even if I were
16 to put them in, I would very likely sever them out of this
17 trial anyway. So we're going to postpone that whole problem to
18 a future date.

19 Now, is that much clear? Everybody understand what I just
20 said?

21 **MR. VERHOEVEN:** Yes, your Honor.

22 **MR. JACOBS:** Yes.

23 **THE COURT:** Okay, good.

24 Now, we have a case to try and I need the help of the
25 lawyers to help get this to the jury and simplify things. You

1 all have a huge task in front of you. You have 1200 documents
2 that are brand new.

3 No case needs more than about 100 documents, even in a big
4 case like this. I doubt that you're going to rely on more than
5 100, maybe 200 documents per side.

6 **MR. VERHOEVEN:** I agree, your Honor, and --

7 **THE COURT:** So you need to start thinking. I have a
8 number of motions to knock out part of your case. Knock out
9 part of their affirmative defenses. I'm very close to ruling.
10 I'm not quite there yet, but I'm going to get those out.

11 So we're going to be moving this case toward a triable
12 mode so that we can get the jury over there and we will be
13 starting and there will no longer be the opportunity to whine
14 and complain about pretrial stuff, other than the possibility
15 that I still have in mind, that some of the -- some of the
16 documents that weren't produced and so forth, that the jury
17 should know about that. I haven't ruled on that yet.

18 We're going to get to trial. We're going to have a
19 verdict. Wheels of justice will grind.

20 Okay. I think we're done for today.

21 Yes.

22 **MR. JACOBS:** A housekeeping item.

23 **THE COURT:** Yes.

24 **MR. JACOBS:** Relates to the order you have rendered
25 on the motion to amend. There is a pending discovery motion

1 before Judge Corley on seeking the production of Uber source
2 code. It's the one that followed --

3 **THE COURT:** If it relates to this subject, then we
4 ought to just postpone that until after the trial.

5 **MR. JACOBS:** That would be terrific, your Honor.

6 **THE COURT:** And then if these two trade secrets get
7 rolled into the case, it would be very interesting to compare
8 your code to their code and see how close the codes are.

9 **MR. VERHOEVEN:** Well, I think that your Honor's
10 statement establishes what I was just about to say, which is we
11 don't have access to their code yet. So before we reach that
12 issue, we should have access so we can do the comparison you're
13 talking about.

14 **THE COURT:** First, I'd have to rule on whether or not
15 you even get to add that, the two to the list. But if you were
16 allowed to put it on the list, then somebody ought to look at
17 the codes to see if they are the same or, you know, use
18 whatever you're claiming is your actual trade secret.

19 **MR. JACOBS:** So can I take that as direction on the
20 motion before Judge Corley, your Honor, that that is deferred?

21 **THE COURT:** If you both agree that it is directed
22 toward discovery on this new alleged trade secret, which -- is
23 it?

24 **MR. VERHOEVEN:** Yes, it is. But I just want to say
25 for the record that it would be helpful for us to have it so

1 that we could further support the motion to amend.

2 **THE COURT:** No, no, no. See, you all need to try to
3 get your case ready for trial. We're down to about one month
4 away before we're selecting the jury.

5 We should not be -- we should not be diverting ourselves
6 into source code until after trial number one is out of the
7 way.

8 **MR. JACOBS:** Thank you, your Honor.

9 **THE COURT:** All right. So my next time to see you
10 all is the final pretrial conference again; is that right?

11 **MR. JACOBS:** I believe that's right, your Honor.

12 **THE COURT:** So I thank you very much.

13 I am going to -- after all my hearings, I let the Hastings
14 students come up and talk to me, but I don't talk about your
15 case or any case. I just let them ask me questions. You're
16 free to stay or not as you wish, but you have my word that we
17 will not talk about anything that happened in your hearing.

18 All right?

19 **MR. JACOBS:** Thank you, your Honor.

20 **MR. VERHOEVEN:** Thank you, your Honor.

21 **THE COURT:** All right. Have a good day. Thank you.
22 We're off the record.

23 (Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, October 26, 2017